Supreme Court, U.S.
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No. 96-1432

In The

Supreme Court of the United States

October Term, 1996

YOURDON, INC.,

Petitioner,

vs.

SUSAN Q. BRIDGES, VIRGINIA D'APONTE and KIMBERLY MURYASZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Susan Q. Bridges, Virginia D'Aponte, and Kimberly Muryasz respectfully request that this Court deny Petitioner Yourdon, Inc.'s application for a writ of certiorari.

RESPONDENTS' OBJECTIONS

The respondents object to the petitioner's statement of the facts and the issues of law.

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, Title VII, Section 706(k), 42 U.S.C. § 2000e-5(k), provides:

> "In any *action or proceeding under . . . [Title VII]* the Court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorneys' fee as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person." (Emphasis added)

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 provides:

> "In any *action or proceeding to enforce a provision of [42 U.S.C. Title VII]* sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . *the court*, in its discretion, *may allow the prevailing party*, other

than the United States, *a reasonable attorneys' fee as part of the costs.*" (Emphasis added)

STATEMENT OF THE CASE

This case involved, among other things, the equitable damages provisions of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-5(g), (k)] prior to the adoption of the Civil Rights Act of 1991 (42 U.S.C. § 1981A) (November 21, 1991) and New York State Law [NYS Executive Law, § 290 *et seq.*] which permits a jury award for compensatory damages for sex discrimination in the employment context and award of attorneys' fees [42 U.S.C. § 1988].

In November, 1991, following a one (1) year exhaustion of administrative remedies at the EEOC level [1990-1991], respondents filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the New York Human Rights Law, N.Y. Exec. Law § 296(1)(a), alleging *quid pro quo* sexual harassment and the creation of a hostile work environment. For an extensive factual and procedural background, see *Bridges v. Eastman Kodak Co.*, 91 Civ. 7985, 1996 WL 47304 (S.D.N.Y. Feb. 6, 1996) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 1995 WL 529880, 68 F.E.P. Cases 1587 (S.D.N.Y. Sept. 8, 1995) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 885 F.Supp. 495, 66 F.E.P. Cases 1688 (S.D.N.Y. Jan. 19, 1995) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 850 F.Supp. 216, 64 F.E.P. Cases 1100 (S.D.N.Y. 1994) (Carter, J.); *Bridges v. Eastman Kodak Co.*, 822 F.Supp. 1020, 64 F.E.P. Cases 1093 (S.D.N.Y. 1993) (Carter, J.); *Bridges v. Eastman Kodak Co.*,

800 F. Supp. 1172, 61 F.E.P. Cases 9 (S.D.N.Y. 1992) (Carter, J.) (Record A-22).[1]

In January and February, 1995 the respondents tried their case before a federal jury based on their complaint, which asserted, that in 1989 and 1990, while respondents were employed at Yourdon, Inc. (hereinafter "Yourdon") (an Eastman Kodak Company subsidiary), they suffered acts of serious sexual harassment involving penile exposure, urination in waste baskets, and extremely lewd and offensive comments. This created a sexually hostile working environment resulting in their constructive discharge in February and March of 1990. Each respondent corroborated the sex discrimination claims of the other.

This action was tried before a jury over the course of two weeks in January and February, 1995, with the jury rendering a "special verdict" in favor of the respondents for back pay and emotional injuries on their pendent N.Y. State Human Rights Law, Executive Law, § 296(1)(a) (1982) claims awarding a combined $124,110.65 in damages and interest in this matter.

In February, 1996 the district court awarded the respondents' attorneys' fees and costs following their successful Title VII (and related state law) action against Yourdon. See *Bridges v. Eastman Kodak Co.*, No. 91 Civ. 7985, 1996 WL 43704 (S.D.N.Y. Feb. 6, 1996) (CA-1-7).[2] Yourdon appealed to the Second Circuit challenging the

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[1] The reference (Record "A-page") refers to the Record On Appeal to the Circuit Court of Appeals for the Second Circuit.

[2] The reference (Record "CA-page") refers to the Appendix annexed to the petition for writ of certiorari.

extent of the fee award as against the amount sought and specifically challenged Ms. Bridges' eligibility for attorneys' fees and costs.

On December 10, 1996 the Second Circuit reviewed the substantial jury award, the specific and overall outcome of the case [for all three plaintiffs], the district court's findings of liability as defined by Title VII and federal law, and fully affirmed the district court's award of attorneys' fees.

The circuit court, in *Bridges v. Yourdon, Inc.*, 102 F.3d 56 (2nd Cir. 1996) held that the district court did not abuse its discretion in awarding attorneys' fees in the amount that it did *based on the substantial outcome, the representation of all three plaintiffs, and the nature of the litigation and the defense presented.* The circuit court separately addressed the issue of Ms. Bridges' eligibility for attorneys' fees and costs. In doing so it specifically addressed this Court's holding in *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) and other rulings. The circuit court held that Ms. Bridges was a "prevailing party" eligible for attorneys' fees and costs. Following the appeal, Yourdon filed the petition for writ of certiorari in March, 1997.

I

THE SECOND CIRCUIT PROPERLY FOUND RESPONDENT BRIDGES A "PREVAILING PARTY" ENTITLED TO ATTORNEYS' FEES AND EXPENSES FULLY CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR V. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS

The unanimous opinion of the Second Circuit in this case, that Ms. Bridges was a "prevailing party," was based on the correct application of this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). The circuit court properly refused to ignore respondent Bridges' success on the essential elements of her federal and state law claims, which, Yourdon argues this Court should do to grant the writ of certiorari.

Yourdon argued that this Court must, and should, refuse to credit all three respondents with having obtained a large financial recovery and substantial success on their state law claims; a sum totalling $124,110.65. Yourdon's premise is entirely unsupported by statute or precedented case law. Petitioner fails to cite reference to a single case in support of this premise.[3]

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[3] Respondents signaled an interest to settle the case at every phase of the litigation. Kodak and Yourdon simply were not interested in pursuing a settlement, or, an FRCP Rule 68 Offer of Judgment. (A-130) *The award of attorneys' fees and expenses represented the services rendered by counsel on behalf of all the respondents whose claims were intertwined.* Attorneys' fees would remain the same under these circumstances regardless of the number of respondents. The respondents would have been witnesses to each others' case and would have been deposed and attended the trial in any event. Yourdon skewed the respondents' overall success on the merits by excluding any

The Second Circuit and the district court considered the *entire* recovery of $124,110.65 as "substantial" and not "technical." It held that the fee and expense award was justified given the specific facts and experiences of the parties of this case.

A. Bridges Is Entitled To Attorneys' Fees And Expenses For Her Pendent Claims

This Court's ruling in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 57-58, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980), has settled, over a decade ago, the issue that a plaintiff who receives all of her relief under New York State Law, and whose federal claim has not been rejected, is entitled to an award of attorneys' fees in her original Title VII enforcement action.

An award of attorneys' fees may properly extend to related pendent state law claims, if the party also prevails on her federal civil rights claim. See *National Organization For Women v. Operation Rescue*, 37 F.3d 646, 653 (D.C. Cir. 1994), citing reference to *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983).

In establishing parameters for the application of the fee shifting statute, 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1988, the Supreme Court, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980) had, as early as June, 1980, addressed the issue whether a

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reference to the full award achieved. Moreover, Yourdon's characterization of the overall results (including state law awards) as "irrelevant" to the Title VII enforcement action was rejected by the circuit court as unsupported as a matter of law.

prevailing plaintiff on a discriminatory employment complaint, filed at the New York State administrative level pursuant to Title VII and applicable NYS Human Rights Law, Exec. Law § 296, could seek attorneys' fees for those proceedings, without an independent federal action filed under Title VII in federal court. This Court ruled that Title VII authorized a federal court to award fees in an action for fees only, without an independent federal action seeking enforcement of a Title VII claim. In *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 12, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986), the Court further held that plaintiffs in a Title VI claim must seek enforcement of their claims "in suits," "through courts," and by "judicial process" (citing *Webb v. Dyer County Board of Education*, 471 U.S. 234, 241, n.16, 105 S.Ct. 1923, 1927-1928, 85 L.Ed.2d 233 (1985)).

These cases are instructive to this case as well. Justice O'Connor wrote in her majority opinion:

> "Moreover, to support its statement that the 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*,' the Senate Report cited cases that involved at a minimum the filing of a judicial complaint. [citations omitted]. . . . The House Report, even while it stresses that 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits, clearly contemplated that parties obtaining fees would have initiated civil rights litigation." (Emphasis added) *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. at 12-13 (1986).

This Court had long established, and the circuit court has recognized, that a federal civil rights claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the NYS Exec. Law § 296, are *"virtually identical."* See for example, *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1048 (2d Cir. 1992), citing reference to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 1896, 72 L.Ed.2d 262 (1982). The Second Circuit followed *Kremer* and ruled that:

> "In light of New York's wholesale adoption of federal standards in discrimination cases under Executive Law [§]296 claims, we find that . . . , a district court sitting at equity in a Title VII action must resolve the Title VII claims in accordance with the jury's determination on the Executive Law § 296 claim." *Song v. Ives Laboratories, Inc.*, 957 F.2d at 1048.

Yourdon absolutely refused to recognize, and indeed, has chosen not to mention throughout their argument in support of a writ of certiorari, the plain and simple fact, that Ms. Bridges was successful on her backpay Title VII claim and recovered $20,000 for pain and injuries related to the violation of her civil rights. It is undisputed that she and the other respondents succeeded on the merits of their Title VII claim against petitioner and on their related New York State Executive Law § 296 claim, both of which involved:

> " . . . a common core of facts or [are] based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. *Such a lawsuit cannot be viewed as a series of discrete claims.*

> *Instead the district court should focus on the significance of the overall relief obtained by the plaintiff. . . . " (Emphasis added) Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). See *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1048 (2d Cir. 1992), citing reference to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 1896, 72 L.Ed.2d 262 (1982).

This Court has held, and it is a matter of settled law, that a suit seeking relief under both Title VII and a related State Fair Employment Law is "an action or proceeding" under Title VII, within the meaning of § 706(k), 42 U.S.C. § 2000e-5(k), as amended. The plain meaning of § 706(k), 42 U.S.C. § 2000e-5(k), as amended, is that a plaintiff who prevails on any claim in that proceeding which is also covered under Title VII is presumptively entitled to attorneys' fees.

The circuit court, with this Court's guidance, held that

> " . . . A plaintiff prevails when she 'succeeds' – and hence 'prevails' – 'when actual relief on the merits of [her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.' *Farrar,* 506 U.S. at 111-12; see also *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) ('[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner

> which Congress sought to promote'); (Cite omitted)."• (CA-4-5)

The circuit court further reasoned that

> "Bridges, . . . has not lost on the merits of her federal claim. Rather, she has secured: (1) a favorable judgment on the merits but no damages because of her failure to mitigate under Title VII; and (2) a favorable judgment on the merits, and *substantial damages*, under the New York State Human Rights Law. We conclude that this constitutes sufficient success to make Bridges a 'prevailing party' eligible for attorneys' fees and costs under § 2000e-5(k)." (CA-5)

The circuit court found that Ms. Bridges is a "prevailing party" eligible for attorneys' fees under § 2000e-5(k) and affirmed the judgment of the district court.

The circuit court followed this Court's holdings in *Farrar v. Hobby*, 506 U.S. 103 (1992), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989) in fully affirming the district court's decision that Ms. Bridges was a "prevailing party" eligible for an attorneys' fee award.

Indeed, the circuit court *pointedly rejected the petitioner's argument* ["that Bridges did not prevail" or "recover any monetary relief" (CA-6)] and ruled consistent with the record and this Court's guidance in *Farrar* and *Hewitt* as applicable to the actual facts in this case. The circuit court ruled that:

> "In arguing that Bridges is not a prevailing party, Yourdon relies heavily on *Farrar's* statement that 'a judicial pronouncement that the

> defendant has violated the [plaintiff's rights], unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, the "moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status.' *Farrar*, 506 U.S. at 112-13 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987) (alteration in original)). We find this caution from *Hewitt* inapposite. First, *Bridges has obtained more than Hewitt's 'interlocutory ruling'* (later lost in the course of litigation resulting in a judgment against the plaintiff). *See Hewitt*, 482 U.S. at 760. *Indeed, she has obtained exactly what the Hewitt Court called for: an actual favorable judgment requiring Yourdon to pay damages. Second, neither Farrar nor Hewitt dealt with a plaintiff who had achieved substantial success – and a large monetary award – on pendent state-law claims."* (CA-6) (Emphasis added)

This Court has long recognized that Congress intended to make it easier for a plaintiff of limited means to bring a meritorious suit under Title VII. A civil rights plaintiff occupies a role that has been termed that of a "private attorney general" in pursuit of a high priority policy; such a plaintiff is ordinarily to be awarded attorneys' fees when prevailing, except in a few special cases. Absent a fee shifting statute, few sex based discrimination and sexual harassment plaintiffs would have the means to pursue their cases. Congress intended to encourage individual plaintiffs faced with discrimination to seek judicial enforcement and relief. *See North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 107 S.Ct. 336 (1986); *Newman v.*

Piggie Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1988).

> " . . . the purpose of [42 U.S.C. § 2000e-5(k)] to facilitate the bringing of discrimination complaints, the humanitarian remedial policies of Title VII, and the statutes structure of cooperation between federal and state enforcement authorities . . . with proceedings before the EEOC and in federal courts being supplements to available state remedies . . . all point to the conclusion that fee awards are authorized for work done in state administrative or judicial proceedings as well as in federal proceedings." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 55.

> "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 65.

B. Bridges Was A Prevailing Party For Purposes Of Obtaining An Award Of Attorneys' Fees And Expenses.

Routinely, courts have determined "prevailing party" status of plaintiffs in civil rights litigation by looking to the benefits secured, not to the mechanism which secures those benefits. This Court has ruled that

> "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some relief he sought through a judgment – *e.g*, a monetary settlement or *a change in conduct that redresses the plaintiff's grievances*. . . . In all civil litigation, the judicial decree is not the end but the means. *At the end of the rainbow lies not a judgment, but some action* (or the cessation of action) *by the defendant that the judgment produces – the payment of damages*, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. (Emphasis added) *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987).

For plaintiffs to be considered "prevailing parties" this Court requires that the plaintiffs have to be able to point to a resolution of a dispute which changes the legal relationship between the plaintiffs and the defendant on *"any significant issue."* (Emphasis added) See for example, *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 790, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989); *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984). Certainly, when the plaintiffs obtain "an enforceable judgment against the defendant from whom fees are sought" the plaintiffs are entitled to be considered "prevailing," not only in a "technical sense" but also in a material sense.

The district court noted that the circuit court follows Supreme Court guidance in this regard. In his February 6, 1996, opinion (A-21, at 24-26) following payment on the Judgment of April, 1995, Judge Carter stressed that *all three plaintiffs* "prevailed" on their Title VII hostile work

environment claims against defendant Yourdon. Judge Carter added that

> "The Second Circuit abides by United States Supreme Court precedent that '[a] party who achieves only partial success in his or her suit may be considered to be a "prevailing party" where he or she *'succeed[s] on any significant issue in litigation which achieves some of the benefit- . . . sought in bringing suit.'* (Emphasis added) *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Furthermore, 'success may be assessed by examining whether plaintiffs can "point to a resolution of the dispute which changes the legal relationship between [them] and the defendant[s]." ' *Ruggiero*, 928 F.2d at 564, quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989)."

The Second Circuit found that:

> "Bridges' federal civil rights claim was heard, *and it was decided in her favor. She also won a substantial monetary award under her related state-law claim.* That is to say, she obtained 'relief on the merits of [her] claim[s]' which, by compelling Yourdon to pay actual damages, 'materially alter[ed] the legal relationship between the parties,' *Farrar*, 506 at 111-12, and through which she has 'achieve[d] some of the benefit [she] sought in bringing suit.' Id at 109. Bridges is therefore a 'prevailing party' eligible for attorneys' fees and costs. See *Aubin v. Fudala*, 782 F.2d 287, 290-91 (1st Cir. 1986); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982)." (Emphasis added) (CA-6)

The circuit court found the cases cited by the petitioner for support to be "inapposite." Indeed, the circuit court found that the petitioner cited cases that "uniformly stand for the proposition that a plaintiff may not recover attorneys' fees for a *losing* Title VII claim." (CA-5)

Petitioner, once again, seeks to refer to these same *losing* cases in a strained attempt to ignore Bridges' successful Title VII and state monetary award. Furthermore, petitioner erroneously treats Bridges' award as though she had two entirely separate and distinct lawsuits, one having absolutely nothing to do with the other. Petitioner fails to provide any law in support of its argument. Yourdon makes an unsupported inferential leap in an attempt to have the Supreme Court ignore the statutory [42 U.S.C. § 2000e-5(k)] directive that "[i]n any *action or proceeding under . . . [Title VII]* the Court . . . may allow the prevailing party, . . . a reasonable attorneys' fee . . . " for the overall relief respondents obtained. *Yourdon's petition is based solely on its legally unsupported claim that treats Title VII as having absolutely no relationship to a New York State Exec. Law claim and ignores settled Supreme Court decisional law to the contrary.*

Once again, petitioner, inexplicably and erroneously cites reference to cases in which a plaintiff *lost* on the merits of his/her federal claims or had his/her federal claims dismissed. Those cases are wholly "inapposite" to the case at bar where the respondents, clearly, and undeniably, recovered tens of thousands of dollars on the essential merits of their Title VII and state law claims.

The petitioner cites the following cases for support, for example, *National Org. for Women v. Operation Rescue,*

37 F.3d 646, 653-654 (D.C. Cir. 1994) (plaintiffs who *lost on the merits* of their federal civil rights claim were not considered "prevailing parties" for purposes of an award of attorneys' fees under 42 U.S.C. § 1988); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (plaintiffs who *failed* to state, and were not entitled to pursue, a claim for relief under federal statute [42 U.S.C. § 1985(3)] were not entitled to any attorneys' fees and expenses); *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. 1990), *cert. denied*, 502 U.S. 814, 112 S.Ct. 65, 116 L.Ed.2d 40 (1991) (plaintiff *lost* all of his federal claims on the merits); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (plaintiffs who either died or released from prison before favorable *judgment mooted* any possible benefit to them not considered prevailing); *Albright v. Good Shepherd Hosp.*, 901 F.2d 438 (5th Cir. 1990) (plaintiff's favorable judgment on his federal *claim was reversed*); *Kelly v. City of Leesville*, 897 F.2d 172 (5th Cir. 1990) (jury found that plaintiff's federal *rights had not been violated*); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, ___ U.S. ___, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995) (federal [42 U.S.C. § 1983] *relief was unavailable* where there was an adequate [state] legal remedy); *McLaughlin v. State*, 784 F.Supp. 961, 980 (N.D.N.Y. 1992) (an application for attorneys' fees based on an interlocutory decision in favor of plaintiff denying a summary motion to dismiss a Title VII *claim* and not decided on the merits was *deemed premature*); *Slade v. United States Postal Service*, 952 F.2d 357 (10th Cir. 1991) (interlocutory relief permitting plaintiff to go forward on the merits is *not "some relief on the merits"* of his claims giving rise to entitlement for attorneys' fees); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847

(11th Cir. 1991), *cert. denied*, 506 U.S. 1078 (1993) (plaintiff who *failed* to recover any damages under Title VII and pendent state tort claims was not considered prevailing); *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396 (8th Cir. 1996) (an Americans with Disabilities Act (ADA) plaintiff who *recovered nothing* on only federal claim is not prevailing); *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) (plaintiff who recovered *no relief* against a specific defendant and obtained "no alteration" in defendant's conduct not entitled to attorneys' fees); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (*interlocutory denial* of a motion in plaintiff's favor concerning discovery orders not considered prevailing for attorneys' fees award); *Cramblit v. Fiske*, 33 F.3d 633 (6th Cir. 1994) (a plaintiff who *failed* to prove any actual or compensatory damage under essential federal statutory or state law claims denied attorneys' fees).

Likewise, petitioner cites reference to cases which it purports to be of some guidance, but which have no factual or legal application to the facts and the law applicable to the success of respondents ($124,110.65) or Bridges ($20,000.00) in this case.

For example, petitioner cites cases where only a nominal damage ($1.00) or insignificant relief was awarded. In *Milton v. Des Moines*, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 87 (1995) (a plaintiff who recovered $1.00 compensatory award and $1.00 punitive damage award entitled to $10,000.00 in attorney fees for violation of 42 U.S.C. § 1983, the right to be free from cruel and unusual punishment, considered of more significance than *Farrar's* allegations concerning a business issue); *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993) (a

plaintiff's nominal award, failure to establish the significance of the legal issues, and lack of public purpose served by the litigation, warranted a no fee finding); *Romberg v. Nichols*, 48 F.3d 453 (9th Cir. 1995) (the plaintiffs' nominal $1.00 award and failure to identify any nonmonetary success resulting from litigation did not warrant a fee award).

Indeed, petitioner also misapplies the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) to the facts in this case. Bridges [all the respondents] recovered substantial monetary awards on the essential elements of her [their] Title VII and state law claims. These results are entirely "inapposite" to the result in the *Farrar* case. In *Farrar*, the plaintiffs did not recover any damages on their federal law [42 U.S.C. § 1983] claims and *they had no state law claims*. The jury found that the defendant's conduct was not a "proximate cause of any damages" suffered by the plaintiffs. On appeal the Fifth Circuit remanded the case for entry of a judgment against the defendant for a nominal damage ($1.00) [considered a "technical victory"].

It would be anomalous that a court hearing a Title VII civil rights claim may award attorneys' fees for time spent on administrative proceedings to enforce civil rights claims prior to litigation and not award attorneys' fees for time spent in a federal judicial proceeding resulting in a favorable state law finding and success on the merits of the federal claim. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. at 14, cited reference to

Carey, [447 U.S. 54]. Bridges' award of $20,000.00 in compensatory damages awarded in an action or proceeding seeking to enforce her successful and meritorious Title VII claims is relevant to her "prevailing party" status and cannot be ignored.

The Second Circuit, clearly understands the significance of the *Farrar* decision and has properly applied the Supreme Court's guidance in *Farrar* and other cases to this case establishing that Bridges was a "substantially successful" and "prevailing party."

II

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S ATTORNEYS' FEE AWARD CONSISTENT WITH THIS COURT'S HOLDING IN *FARRAR v. HOBBY*, 506 U.S. 103 (1992) AND PRIOR RULINGS

A. The Second Circuit Considered Respondents' Overall Success On The Merits Of Title VII And Pendent State Law Claims

The Second Circuit fully considered *Farrar v. Hobby*, 506 U.S. 103 (1992) and prior rulings, and the entire judgment, in light of the overall success of the respondents on the merits of their Title VII and pendent state law claims in considering the award of attorneys' fees and expenses. Unlike the plaintiffs in *Farrar* and *Hewitt*, the respondents in this case, including Bridges, had achieved "substantial success" on most of the significant claims that they and she sought to recover. The award of legal fees was deemed reasonable in light of the overall success of the respondents.

In *Farrar*, the plaintiff recovered a nominal ($1.00) award constituting a "technical victory." Justice O'Connor reasoned that "[w]hen the plaintiff's success is purely technical or de minimis, no fees can be awarded." *Farrar*, 506 U.S. at 117. But Justice O'Connor added that the extent of success was not the only measure applied for consideration. She held that

> "[t]he difference between the amount recovered and the damages sought is not the only consideration, however. *Carey v. Piphus*, 435 U.S. 247, 254 (1978), makes clear that an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved. . . . Accordingly, the courts also must look to other factors. *Instead, it* [attorneys' fees] *is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorneys' fees available under private attorney general theory.* (Emphasis added)

This Court has provided that a district court's determination of the amount of an attorneys' fee award is reviewable only for an *abuse of discretion. Pierce v. Underwood*, 487 U.S. 552, 571 (1988). However, request for attorneys' fees should not result in a second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983). See *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1342 (2d Cir. 1994).

Moreover, the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561 (1986) held that while the amount of damages a plaintiff recovers is certainly relevant to the amount of attorneys' fees to be awarded, it is, however, only one of many factors that a court should consider in

calculating an award of attorneys' fees. *"We reject the proposition that fee awards . . . should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." City of Riverside*, 477 U.S. at 573 (emphasis added).

It has long been settled law that a "strict proportionality" standard has been rejected by this Court. Yourdon's argument that the respondents' attorneys' fee award is disproportionate to only one of the respondent's award of compensatory damages, or to other similar awards, has been rejected as not a proper basis for determining appropriate attorneys' fee awards. Petitioner has ignored the Supreme Court's guidance in *Hensley v. Eckerhart, supra*, regarding the twelve factors essential for a fee award and "lodestar" review. These factors, which were considered by the district court in this case, are a) time and labor required; b) novelty and difficulty of the questions; c) the skill requisite to perform the legal service properly; d) preclusion of other employment of the attorney in taking the case; e) customary fee; f) whether the fee is fixed or contingent; g) time limitations imposed by the client or the circumstances; h) the amount involved and the results obtained; i) experience, reputation, ability of the attorneys; j) the undesirability of the case; k) nature and length of the professional relationship with the client; and l) attorney fee awards in similar cases. The Second Circuit had applied the Fifth Circuit approach in *U.S. Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989) *cert. denied*, 493 U.S. 1071, 107 L.Ed.2d 1022, 110 S. Ct. 1116 (1990) as guidance in reviewing fee awards.

B. In Affirming The District Court's Fee Award The Second Circuit Followed *Farrar v. Hobby* And Prior Rulings Of This Court

The circuit court's reasoning in this case is entirely consistent with Justice O'Connor's guidance in *Farrar v. Hobby*, 506 U.S. at 115. Following the reasoning of Justice O'Connor in the *Farrar* decision, that "[i]n the context of this [Farrar] litigation, the technical . . . nature of [Farrar's] victory is readily apparent: . . . " *Farrar v. Hobby*, 506 U.S. at 120, the Second Circuit ruled in *Pino v. Locascio*, 101 F.3d 235, 237 (2nd Cir. 1996) that in determining whether an award of attorneys' fees is appropriate requires a two-step process. First, the party must be a "prevailing party" and second, the "most important factor in determining the reasonableness of a fee is the degree of success obtained" (citing reference to *Farrar*).

In the *Pino* case the Second Circuit ruled that a ["readily apparent"] nominal damage of $1.00 and a failure "to prove an essential element of his claim" warrants "no fee at all." After its *Pino* decision, the Second Circuit, in *Carrol v. Blinken*, 105 F.3d 79, 81 (2d Cir. 1997) emphasized that the *Pino* case stands for the proposition "that in determining the reasonableness of a fee award in civil rights actions the quantity and quality of relief obtained is a critical factor." Thereafter, in *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94 (2d Cir. 1997) the Second Circuit provided additional insight into its understanding of the Supreme Court's guidance in *Farrar* which also cited reference to its decision in *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). In *Orchano*, 107 F.3d at 98, the Second Circuit reasoned that *Farrar* exemplifies those circumstances

when an award of attorneys' fees under special circumstances would be "unjust." Once having determined that an attorneys' fee award would "not be unjust," the district court may properly consider the twelve factors the Supreme Court set out in *Hensley* that should be followed in determining what constitutes a "reasonable fee" within the meaning of § 1988 and other fee-shifting statutes.

Clearly, the circuit court had properly applied *Farrar v. Hobby* and the other Supreme Court decisions in reviewing appeals concerning attorney fee awards. In this case, the substantial monetary recovery of the respondents ($124,110.65) was "readily apparent" to the circuit court. It was not a "technical victory" by any means. Certainly not one which would invite a special consideration to deny a fee award. Moreover, the circuit court cited reference to *Farrar* as supporting a full affirmance of the lower court's award of attorneys' fees, while rejecting Yourdon's unsupported notion that the pendent state claim was irrelevant. The circuit court concluded that Bridges recovered a substantial sum from the petitioner and Kodak; that her success (as well as the other respondents) was clearly not "technical;" but was indeed "substantial" on the merits, and affirmed the attorneys' fee award as fully

> *" . . . justified, however, by the length of this litigation, the acrimony and vigor with which every point was contested, and that such cases be brought as remedies for violations of civil rights." Bridges v.*

> *Eastman Kodak Co.*, 91 Civ. 7985, 1996 WL 47304, *12 (S.D.N.Y. Feb. 6, 1996) (Carter, J.).(A-30).

and further, that this case

> *" . . . contributed to Title VII case law and helped to realize Congress's intent in passing the Civil Rights Act of 1964. Plaintiffs, and others like them who suffer from sexual harassment, must have appropriate remedies available to them or their rights become meaningless. Attorneys' fees are one way to ensure that such avenues remain open.* See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (affirming that Congress enacted legislation authorizing fee awards in civil rights cases in order *to enable those whose rights have been violated to seek redress in the courts)."* (Emphasis added)(A-30).

Indeed, this case involved complex and novel issues of evolving law spanning the period between *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and pre- and post-amendments to the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e *et seq.* [November 21, 1991, 42 U.S.C § 1981-A (CRA 1991)]. The outcome in this case gave rise to a number of decisions that remain the subject of law review articles, bar association conferences, and precedented case law.

The circuit court has correctly applied this Court's holdings in *Farrar v. Hobby*, and other rulings in fully affirming the lower court's attorneys' fee award for all the respondents.

III

THIS COURT SHOULD HAVE NO INTEREST IN GRANTING A WRIT OF CERTIORARI IN THIS CASE

This case represents the proper application of this Court's holdings regarding the application of the attorney fee shifting statute in civil rights cases. The civil rights victim does not have the financial resources to litigate a claim against a large Fortune 100 company, particularly one that is prepared to spend seemingly unlimited resources to frustrate and discourage its employees from suing for violation of their rights. These same civil rights victims often are lower salaried employees who are required to mitigate damages. Therefore, their potential recovery may not be as great.

Nevertheless, corporate defendants that refuse to accept responsibility for the actions of its supervisors and agents who discriminate against employees because of their sex in the employment context, and who make no effort to resolve legitimate claims, and defend at all costs, must reasonably anticipate that successful plaintiffs will seek to recover attorneys' fees. The vast majority of discrimination cases would not be brought, indeed they would be discouraged as Kodak and Yourdon has attempted to do, if plaintiff's counsel could not recover a reasonable fee for the services rendered. Plaintiff's counsel cannot, and should not, be compelled to abandon the client when confronted by overwhelming litigation defense tactics. Otherwise, wealth and power will dictate the direction of these high priority public policies and how effective the civil rights statutes will be applied. Respondents submit that this appeal, by petition for a

writ of certiorari, is an example of petitioner's tactics in this case.

This Court and the Second Circuit has recognized that attorneys' fees are reflective of the nature of the outcome in the case as well as the significance and benefit the public derived from the case, the work performed, the quality of the services rendered, and the experience of the plaintiff's counsel necessary to accomplish a successful result.

Circuit courts, including the Second Circuit, have consistently applied *Farrar v. Hobby*, and refused to allow attorney fee awards in cases resulting in a purely "technical" recovery. *This case was not such a case.*

For this Court to grant the writ of certiorari it must accept the petitioner's argument that this Court: (1) ignore settled law and respondents' successful and favorable jury award and finding based on a Fair Employment statute supplementing Title VII as deemed relevant to an attorney fee award, (2) ignore the overall and substantial monetary results satisfied by Kodak and Yourdon paid to all the respondents, (3) ignore the settled law against a "strict proportionality" standard, (4) ignore the *Farrar v. Hobby* standard defining who is a "prevailing party", (5) ignore the twelve *Hensley* factors of review applicable to district courts in awarding reasonable attorneys' fees, and (6) ignore the efforts of the defendants to frustrate the purpose of the civil rights laws while refusing to participate in resolving the matter throughout the course of litigation.

The facts in this case were historically unique given the timing of the case (1990) and the enactment of the

Civil Rights Act of 1991 (November 21, 1991) providing for compensatory relief similar to State Fair Employment laws. Moreover, the likelihood that a corporate defendant will be willing to incur attorneys' fees and costs and not resolve legitimate civil rights claims brought by employees should also be rare. For these reasons, and the reasons argued hereinabove, this Court should have no interest in granting a writ of certiorari.

CONCLUSION

For the reasons discussed above petitioner's writ for certiorari in all respects should not be granted.

Respectfully submitted,

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